relations between brother and sister,[9] but not between brothers;[10] between father-in-law and son,[11] but not between mother-in-law and son;[12] between co-owners,[13] but not between mining partners.[14]

It is evident from a study of the cases in which the courts have resorted to the fiction of constructive fraud, that they would prefer to discard altogether the old narrow rule requiring fraud as an element of constructive trusts, and that they have endeavored to establish a broader rule allowing a constructive trust to arise in any case where a person obtains a legal title by virtue of a confidential relation under such circumstances that he ought not to retain the beneficial interest.[15] This equitable principle might have been established earlier on more simple and sane premises, if the courts had originally understood the theory underlying trusts arising by "operation of law" as provided for in the Statute of Frauds. The failure to understand the theory was due to their confusing specific performance of express trusts with restitution in constructive trusts because of the mere accident that, in most cases, both afforded the same relief.[16] The true principle which should govern constructive trusts is that of unjust enrichment, as it does in contracts arising by operation of law.[17] If this theory had been understood and applied there would have been no necessity of resorting to legal fictions or of creating new rules which might lead to confusion, for in cases where it could be shown that to allow the defendant to retain title would unjustly enrich him at the expense of the plaintiff, it would be decreed that the property be restored. Such a principle, furthermore, would not abrogate the Statute of Frauds nor endanger the security of titles in property any more than quasi-contracts destroys the principle of true contracts.

RATE REGULATION OF PUBLIC SERVICE COMPANIES BY MUNICIPAL CORPORATIONS.—It is a well established principle of our law that the legislative branch of the government is vested with power to regulate

---

[9]Goldsmith *v.* Goldsmith, *supra;* Noble *v.* Noble (1912) 255 Ill. 629.

[10]Hamilton *v.* Buchanan (1893) 112 N. C. 463. This was the case of an insane brother, in which it was held that there were no confidential relations unless a fraudulent advantage had been taken in reference to the particular sale. See Pierce *v.* Pierce (1885) 55 Mich. 629, 637.

[11]Bowler *v.* Curler (1891) 21 Nev. 158.

[12]Barnes *v.* Taylor (1876) 27 N. J. Eq. 266.

[13]Koefoed *v.* Thompson, *supra.*

[14]Bissell *v.* Foss (1885) 114 U. S. 252. Other relations considered confidential, are stepfather and stepdaughter, see Newis *v.* Topfer (1903) 121 Iowa 433, grandfather and minor grandson, Roggenkamp *v.* Roggenkamp (C. C. A. 1895) 68 Fed. 605, aunt and niece, Butler *v.* Hyland (1891) 89 Cal. 575, nephew and uncle, Ward *v.* Conklin (1908) 232 Ill. 553, priest and parishioner, see Henderson *v.* Murray (1909) 108 Minn. 76.

[15]1 Perry, Trusts (6th ed.) § 166. But the mere reposing of confidence is not enough to raise a trust, however dishonorable the violation of such confidence may be. Patten *v.* Warner (1897) 11 App. D. C. 149.

[16]See article by Professor J. B. Ames entitled "Oral Trusts of Land", 20 Harvard Law Rev., 549.

[17]See "Resulting Trusts and the Statute of Frauds", Professor Harlan F. Stone, 6 Columbia Law Rev., 326.

private property which is devoted to public use.[1] This includes the power to regulate rates to be charged for the service,[2] subject, however, to the limitation that the return must admit of a fair profit on the investment in order that the exercise of the power may not amount to a taking of property for public use without due compensation.[3] Although it has been questioned whether this legislative function may be delegated to a municipality, the great preponderance of authority supports the view that it may be;[4] and finds no objection in the fact that this practically makes the municipality judge in its own case in that it prescribes the rates at which the utility it consumes shall be supplied, because the presumption is that the rate making power will not be abused.[5]

An interesting question presents itself as to whether a municipality possessing such rate determining power, may contract away that right for a given time. While it is difficult to formulate any definite answer, since the decision in each case must turn upon the particular laws, ordinances and facts involved, still it is possible to state a few controlling principles. For the reasons that the power is continuing in its nature and that, if it were contracted away, a power of government would be extinguished *pro tanto*, the law favors its continuance in the legislature or its agents and will construe all doubts in favor of their still possessing it.[6] So where power is granted to a municipality "to contract with any person or corporation to construct waterworks 'at such rates as may be fixed by ordinance * * *,'" one ordinance of the city prescribing rates is not conclusive, and different and lower rates may be thereafter fixed.[7] But the municipality may bind itself, and where it is empowered to grant privileges to utilities on such conditions as it may deem expedient, a contract with the company precludes the city, although not the State, from altering the rates

---

[1]Munn *v.* Illinois (1876) 94 U. S. 113, 130; Pond, Public Utilities, § 191.

[2]See Pond, Public Utilities, § 498; 14 Columbia Law Rev., 522.

[3]The Minnesota Rate Cases (1913) 230 U. S. 352, 433.

[4]"The power to fix, subject to constitutional limits, the charges of such a business as the furnishing to the public of telephone service is among the powers of government, is legislative in its character, continuing in its nature, and capable of being vested in a municipal corporation." Home Telephone Co. *v.* Los Angeles (1908) 211 U. S. 265, 271; see Spring Valley Water Works *v.* Schottler (1884) 110 U. S. 347; *contra*, Agua Pura Co. *v.* The Mayor (1900) 10 N. M. 6, which proceeds on the ground that such a grant to be valid must provide for a judicial investigation as to reasonableness. This entirely overlooks the fact that whether expressed or not such power of review none the less exists; see Knoxville *v.* Knoxville Water Co. (1901) 107 Tenn. 647, 688, affd. (1903) 189 U. S. 434; and for this reason the New Mexico case scarcely seems supportable. See Pond, Public Utilities, § 509.

[5]Spring Valley Water Works Co. *v.* Schottler, *supra*, p. 354.

[6]Home Telephone Co. *v.* Los Angeles, *supra*.

[7]Freeport Water Co. *v.* Freeport (1901) 180 U. S. 587. (The decision in this case was by a court divided five to four, the minority contending that the construction given the provision in question by the majority did violence to its plain meaning.) *Semble*, Knoxville *v.* Knoxville Water Co., *supra*. The Supreme Court of the United States in construing statutory grants to municipalities will follow, if possible, the interpretation placed upon the statutes by the state courts. Wyandotte County Gas Co. *v.* State (1914) 231 U. S. 622.

during the life of the contract.[8] Further than this, the courts proceed with reluctance; and it is only where there is a broad grant of power, conferring on a city without restriction or limitation the right to contract for a utility, or where the power to bind the State is given expressly or by necessary implication, that the municipality may contract for reasonable rates during a reasonable time in such a manner as to bind the State.[9] A good example of how any such contract between a city and a public utility will be construed in favor of the State retaining power to regulate rates, is furnished by the recent case of *City of Benwood* v. *Public Service Commission* (W. Va. 1914) 83 S. E. 295. The city had prescribed by ordinance, duly accepted by the water company, the rates to be charged by the latter. Later the State created its public service commission[10] which allowed the company to increase its charges. In answer to the city's contention that this regulation impaired the obligation of its contract with the water company, it was held that this was not the case, because the city was not empowered either expressly or by necessary implication to bind the State.[11] Furthermore, contracts binding between individuals in such a case are not impaired by subsequent legislative regulation even though they are thereby nullified, for the parties will be presumed to have had such a possibility in mind.[12]

[8]Manitowoc *v.* Manitowoc etc. Co. (1911) 145 Wis. 13; Cleveland *v.* Cleveland City Ry. (1904) 194 U. S. 517.

[9]Vicksburg *v.* Vicksburg Waterworks Co. (1907) 206 U. S. 496. Although such broad power is not given a city, the same result is reached as regards the validity of the contract where the State has subsequently ratified the city's action in entering into it. Los Angeles *v.* Los Angeles City Water Co. (1900) 177 U. S. 558; Minneapolis *v.* Minneapolis St. Ry. (1910) 215 U. S. 417. In the following cases the power granted to the city was held insufficient to enable it to preclude the State by its contract. Milwaukee etc. Co. *v.* Railroad Commission (1913) 153 Wis. 592; State *v.* Superior Court (1912) 67 Wash. 37; City of Dawson *v.* Dawson Tel. Co. (1911) 137 Ga. 62.

[10]Acts of West Virginia, 1913, c. 9.

[11]The section of the city charter conferring power over water companies was as follows, "* * * to erect, or authorize or prohibit the erection of, gas works, electric light works, or waterworks, in the city; * * *." Acts of West Virginia, 1895, c. 63, § 10.

[12]This rule was announced as regards interstate commerce in Louisville & N. Ry. *v.* Mottley (1911) 219 U. S. 467.